United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALAMO CATTLE COMPANY,
Sociedad Anonima,
Plaintiff in Error,
vs.
JOHN G. HALL,
Defendant in Error,

BRIEF FOR
Defendant in Error.
No. 2451

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Dated San Francisco, California,
October 15, 1914.

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STATEMENT OF THE CASE.

On January 19, 1914, the defendant in error, hereinafter called the plaintiff, filed a suit in the district Court of the United States in and for the District of Arizona against the Alamo Cattle Company, Sociedad Anonima, hereinafter called the defendant, based upon a certain contract for the sale of four or five thousand two year old steers and one thousand head of four year old steers at the price therein stated, which steers were to be as good or better than the Terrasas cattle, and were to be delivered in trainload lots, upon which contract the defendant received Ten Thousand ($10,000.00) Dollars in United States currency. The contract, among other things, provided "the seller hereby acknowledges receipt of (Ten Thousand) Dollars U. S. Cy. in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and

failing to do so he shall forfeit the amount or amounts advanced on this contract. The seller agrees to pay two dollars, in addition to returning the forfeit, on each head he fails to deliver under this contract, which shall constitute entire claim for damages." The contract contained a further provision as follows, (p. 10); "The seller also agrees to allow the buyer the privilege of cutting out and rejecting fifteen per cent of said cattle after all runts, stags, (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle *have been cut out by the seller*". Plaintiff alleged in the complaint that defendant failed, neglected and refused to deliver to plaintiff the cattle in the numbers and of the grade, brand, kind and character required by it to be delivered under the terms of the contract in this; that the cattle tendered for delivery were not cattle tendered in train-load lots as good or better than the Terrasas cattle, or of the grade, kind, character, brand or numbers required under the terms of the said contract to be delivered in train-load lots at Nogales in the State of Arizona, and asked for judgment for the return of the $10,000.00 previously paid on the contract and for the further sum of $2.00 a head on Five Thousand head as liquidated damages, as provided in the contract, or the sum of $20,000.00 with interest and costs.

On April 23, 1914, the defendant filed its amended answer in which it admits receipt of $10,000.00 and admits the plaintiff was assignee of the contract and had a right to sue thereon, and for separate defense it set up affirmatively the execution of the contract sued upon; that they were ready, willing and able to comply with the terms and

conditions of the said contract by it performed, and did duly and fully comply with and perform said terms and conditions until plaintiff refused and failed to perform as therein more fully set out, etc.; that in the early part of April, 1913, defendant duly tendered to plaintiff and his duly authorized representative one thousand head of cattle of the kind and quality which defendant agreed to furnish by said contract; that on May 9, 1913, defendant tendered to plaintiff and his duly authorized representatives from one thousand *twelve* hundred to one thousand five hundred head of cattle, of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of said contract, and on May 13, defendant tendered one thousand ninety-three cattle of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of said contract; but plaintiff without right or authority broke and failed to perform his part of the contract, and refused to select and accept any of said cattle, although the said cattle in every respect fulfilled each and all terms and conditions of said contract relating thereto, etc., and further alleges that the amount of damages which defendant might and could sustain by reason of the breach of the contract on the part of plaintiff are uncertain in amount and that the $10,000.00 mentioned in said contract was and is reasonable and a usual sum fixed upon and paid to defendant as liquidated damages for the breach of the contract upon the part of the plaintiff.

Defendant further sets up a cross-action against the plaintiff, alleging damages in the sum of $17,300.00 for breach of said contract, upon which the defendant re-

ceived $10,000.00, and asks judgment for the balance of $7,300.00 together with interest thereon. Plaintiff filed merely a formal denial to the counter-claim and cross-complaint of the defendant.

The case was called for hearing in Tucson on May 20, 1914; a jury selected and both parties went to trial upon the merits of the case. At the close of the evidence, the argument and the instructions of the court, the jury retired and returned a verdict of $21,225.00 in favor of the plaintiff. From this judgment the defendant sued out a writ of error in this court, and has alleged thirty-two errors, of which it complains, but which have been grouped in brief under six points, which we will answer in the order raised.

POINT NO. ONE.

The burden of proof was not upon the defendant to show the cattle tendered on May 9th and 12th, 1913 fully complied with the contract in every respect.

STATEMENT.

The Court instructed the jury (p. 332):

> "You are instructed that the burden of proof is upon the Alamo Cattle Company *BEFORE THEY CAN RECOVER JUDGMENT AGAINST PLAINTIFF* to show that cattle alleged to have been tendered on May 9th and 12th, 1913, fully complied with the contract in every respect."

which was objected to (p 345) "because the burden of proof was upon the plaintiff to show a breach of the contract by the defendant."

The Court further instructed the jury (p. 332) :

"As I will presently charge you, if you find for the defendant, your verdict will mean that the defendant is entitled to retain the $10,000.00 already paid it, but no other sum or sums whatever."

And (p. 343).

"On the other hand if you believe from the testimony that the defendant, the Alamo Cattle Company, on or about said time above mentioned, tendered to the plaintiff Hall a train-load of cattle, and further believe that same were in the numbers and of the ages, brands, grades and quality required by the contract, and that the cattle were tendered in full compliance with the terms of the contract, and that plaintiff Hall declined to receive them or accept them, and did not accept then, then the defendant, the Alamo Cattle Company, was justified in writing the letter dated May 13, 1913, declaring the contract forfeited and at an end."

"The jury are instructed that the burden is upon the plaintiff and it is for him to prove every material allegation of his complaint by a preponderance of the evidence, if upon any one or more of the material allegations of the plaintiff's complaint the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant. By preponderance of the evidence is meant the weight of evidence; that which on the whole when fully, fairly and impartially considered by the jury produces the stronger impression upon the mind of the jury and is more con-

vincing as to its truth when weighed against the evidence in opposition thereto."

And (p. 337)

"If you find that defendant tendered and offered to the plaintiff the cattle called for in the contract in the quantity and of the ages specified in the contract, and that such cattle were as good or better then Terrasas cattle, then the verdict must be for defendant."

"If you believe that the cattle tendered to plaintiff on May 9th and May 12th fulfilled all the requirements of the contract and that plaintiff failed or refused to accept them, then this constituted a breach of the contract on the plaintiff's part, which relieved the defendant of any further duty to be performed on its part, and justified the defendant, Alamo Cattle Company, in writing the letter dated May 13, 1913, declaring that plaintiff's right in the contract forfeited."

Defendant plead, (p. 20) :

"That at all times during the months of April and May, 1913, as required by the terms of said contract between defendant and the said E. W. Myers, dated January 16, 1913, defendant was ready, willing and able to comply with the terms and conditions of said contract to be by it performed, and did duly and fully comply with and perform said terms and conditions on its part until the plaintiff refused and failed to perform the terms and conditions of said contract on his part to be performed, as hereinafter more fully set forth."

That they did in the early part of April, 1913, and on

May 9th and May 13th, tender to plaintiff cattle of the kind and quality which defendant agreed to furnish and sell under and pursuant to the terms of said contract, but plaintiff without any right or authority broke and failed to perform his part of said contract and refused to select and accept any of the said cattle as offered and tendered, although said cattle in every respect fulfilled each and all the terms and conditions of said contract relating thereto.

PROPOSITION A.

Where defendant sets up a cross-action or counter-claim, it has the affirmative and assumes the consequent burden of proving the facts upon which it is based.

Brockman Com. Co. v. Kilbourne, 86 S. W. 275, 111 Mo. App. 542;

Lilienthal v. U. S. 97 U. S. 237.

Kelley v. Springfield Road Roller Co., 72 S. E. 749;

Highsmith Bros. v. Hammonds, 138 S. W. 635.

DISCUSSION.

It should be noted that the instruction complained of merely had to do with the affirmative relief that the defendant asked for, and upon which question the court was quite proper in giving the instruction requested.

PROPOSITION B.

It is a general rule that the seller of goods has the burden of proving, before he can recover, that the goods sold or attempted to be delivered complied with the sample or the contract, especially where he asks affirmative relief.

Brockman Com. Co. v. Kilbourne, 86 S. W. 275;
Bauer Cooperage Co. v. Tartar, 139 S. W. 947;
Pope v. Filley, 9 Fed., 65;
McCall Co. v. Jacobson, 102 N. W. 969, 139 Mich, 453.

DISCUSSION.

Under the pleadings the plantiff (p. 7) alleged that defendant failed and refused to deliver cattle in the numbers and of the grade, brand, kind and character, required by contract, and those tendered were not contract cattle, and the defendant (p. 20) alleged they tendered on the different dates cattle of the kind and quality which defendant agreed to furnish and sell under contract and plaintiff refused to accept them although they complied with all the terms and conditions of the contract,—plaintiff having asserted the negative of this proposition, the defendant the affirmative, and under the pleadings it was as essential for the defendant to prove that they complied with the contract, so as to get the affirmative judgment for which they prayed, as it was for the plaintiff to prove the negative of the fact, and has often been stated where one party assumes the burden of proving a negative allegation, and the other by his pleadings assumes the burden of the affirmative of that same allegation, only sufficient proof to make out a prima facie case is necessary to throw the burden of the evidence upon the one asserting the affirmative of that allegation, and we do not deny that we had to prove a prima facie case and there was ample evidence presented to the jury, as shown by the record, to sustain the verdict of the jury, and the examina-

tion of the evidence will clearly show that it preponderates in favor of the defendant in error. It should be noted that one of the principal elements was the warranty on the part of the defendant that the cattle that they would deliver would be as good or better than Terrasas cattle, and the evidence all went to that question, and an examination of the record will show that the plaintiff maintained by all of his witnesses the burden of proving that the cattle were not contract cattle and introduced a number of witnesses, who qualified, and all testified the cattle were not contract cattle. An examination of the testimony set out in brief of Plaintiff in Error shows we easily maintained our burden, even though there has been omitted some of the best corroborated facts, as Ben Sneed (defendant's witness) said (p. 299): "The general grade of Terrasas cattle show a predominant red color, almost all of them"; Ramon Elias (Manager of defendant) said (p: 266): "He (Hall) went out and cut out about twenty-five of the white-face, red and best colored steers to one side, and he said 'that's the cattle I want' and I said to Mr. Hall 'there's no use to lose any more time, that's not the cattle I offered, and we'll just let it go until we see Mr. Kibbey." These are practically the same words Mr. Hall used (p. 137), so we must assume those facts are true, and in addition thereto the plaintiff introduced ample affirmative evidence to prove the negative allegation, and did not attempt to shirk the burden, so as a matter of fact we feel there should be no complaint on quantity of evidence to sustain, and, as a matter of law, the court was correct in making defendant, when they of their own accord asserted the affirmative, carry some burden, for no court will say it is necessary for

us to disprove the affirmative allegations of the opposite party by a preponderance of testimony.

PROPOSITION C.

This contract may have been breached either by the defendant not delivering contract cattle on May 9th and 13th, and by writing the letter dated May 13, 1913, as follows, (p. 38, Plaintiff's Exhibit K.):

"Alamo Cattle Co., S. A. Magdalent, Sonora, Mexico, Box 24. Hacienda El Alamo, Nogales, Ariz., May 13, 1913.

Mr. J. G. Hall, El Paso, Texas.

DEAR SIR:

Referring to the contract between ourselves and Mr. E. W. Meyers, dated Jan. 16th, 1913, and transferred to you by him on Feb. 4th, for 4,000 two year old steers and 1,000 four year old steers, to be delivered during April and May, 1913, in train-load lots, beg to advise you that owing to the fact that a herd of two year old steers was tendered you on May 12th consisting of 1,093 steers from which we asked you to cut a train-load, but which you refused to cut or receive, after having come down expressly to receive these cattle, after due notice according to contract, we consider that you have forfeited all rights in the aforesaid contract, and hereby so advise you.

Very respectfully yours,

Alamo Cattle Company, S. A.

By W. Beckford Kibbey, Jr., Pres."

Plaintiff wired Exhibit L. as follows (p: 39):

"Western Union Telegraph Company,

El Paso, Texas, May 14, 1913.

Alamo Cattle Co.

Care First National Bank,

Nogales, Ariz.

I am ready and willing to receive and hereby demand all cattle coming within contract of January sixteenth with Myers which contract was transferred to me. Delivery to be made between May twenty-ninth and June first, nineteen thirteen in train lots. Advise when you want cattle cut.

Chg. J. G. Hall, 3:40 p. m. J. G. HALL."

So it is very evident that the plaintiff was still demanding the cattle under the contract when the defendant itself breached the contract, and either of these breaches are sufficient, if the jury was satisfied that the evidence in the first case favored the plaintiff, the second breach committed by virtue of the letter (Exhibit K.) was sufficient breach to be relied upon, and either of the breaches would have been sufficient upon which to base the verdict, and it may be that the jury considered by virtue of the conflict of testimony that both were at fault on May 13th in regard to quality and quantity of cattle under above letter (Exhibit K.) and telegram (Exhibit L.) they were warranted in their verdict, and we do not agree that the only breach that could occur was the one on May 13th, and do not think the letter (Exhibit K.) is by virtue of its evident cancellation of the contract by defendant of no effect either with this Honorable Court or with the jury and they should not be relegated to second place by the

Plaintiff in Error. In this connection it should be remembered that it became necessary for plaintiff to hold himself ready to receive the cattle under the contract at any time up to June 1st, and he so demanded delivery and was not at fault. Therefore, the only party who could be relieved by a breach on May 13th is the Alamo Cattle Company, if the breach would have been committed by Hall on that day; but if on the other hand the cattle tendered were not contract cattle, the defendant could have delivered contract cattle up to June 1st, had they not broken the contract by their letter of May 13th.

The case of San Francisco C. Agency v. Wideman, (124 Pac. 1056) cited in brief, is not applicable to our case, as in that case the defendant only plead the general issue and did not ask for affirmative relief, as was done by defendant, and the court said "the evidence was more than suffi cient to warrant the conclusion that defendant was at all times ready, able and willing, to make delivery"; and even under the statement of facts, as set out in the brief of Plaintiff in Error, we submit that plaintiff in error is a long way from the position occupied by the defendant in the case cited.

And none of the cases cited on page 20, of the brief, apply, as all but the following went to trial on a general denial, and necessarily compelled plaintiff to prove the essential facts alleged.

The case of Sharp v. State (99 N. E., 1072) was a suit on surety bond; defendant plead general denial and payment,—same facts not alleged in both plead-

ings, nor did both ask affirmative money judgment. Wigmore on Evidence, (p. 3524, Sec. 2486) from which the citation is taken, further states: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different cases."

In the cases cited in Brief (p. 23) there were none of them arose where plaintiff asserted the negative facts and asked for a money judgment and the defendant pleaded the same facts affirmatively and asked for a money judgment.

In Balmford v. Grand Lodge both pleaded the same facts negatively and the plaintiff put in no proof. The question of burden of proof did not arise. The question arose as to whether or not it was necessary to make any, and the court said it was. Plaintiff in Error admits we put in lots of evidence, and hence this case does not apply.

In Fox v. Held, there was no affirmative allegation by defendant of facts plead negatively by plaintiff, and hence is not parallel.

In both Botto v. Vandament and Amador County v. Butterfield, judgment was rendered on pleadings when a general denial was filed, and these cases went off on this question, and are not parallel.

On the other hand the cases of Brockman Company v. Kilbourne (86 S. W., 275) we feel is directly in point and controlling.

The case of Cole v. Carter (22 Tex. Civ. App. 456; 34 S. W. 914) is a case that was reversed especially on ac-

count of the fact the instructions were not broad enough as to the proof of false representations. There was no question in the case as to placing the burden of proof as charged in this appeal, and it is therefore not applicable. Therefore, we say that the court did not err in refusing to give the instruction complained of in Point No. 1.

POINT NO. 2.

The court erred in admitting and excluding evidence and in its instruction to the jury with regard to the question of readiness, willingness and ability on the part of the plaintiff to perform the contract and in its refusal of a new trial because of failure of proof on that subject.

STATEMENT.

All the errors grouped under this point resolve themselves into the one proposition as to the weight of plaintiff's evidence of his ability, readiness and willingness to perform his contract. There was no direct evidence tending to prove he was not able, ready and willing to perform his contract, and counsel for defense on cross-examination brought out sufficient evidence to warrent the court in charging that fact to have been proven had he so desired. Without objection, Mr. Hall testified (p. 142) "I was prepared and ready to receive any pay for all cattle that they could deliver to me under the contract," and went on further to explain his arrangements for payment. On cross-examination (p. 146) Mr. Hall also testified, "I was ready and willing to take the cattle under the contract up to June 1st—that is the limit of the contract."

The theories of the defendant and plaintiff do not

agree as to who has the first move under the contract and an examination of the contract shows the following facts should be taken in their cronological order:

First: Plaintiff should give defendant fifteen days notice for each delivery in train-load lots. This was given as shown by Exhibit C., dated April 25, 1913, and Exhibit D., dated April 28, 1913; and also by telegram dated May 14, 1913, (Exhibit L.), but this provision is for the benefit of defendant and he may waive it.

Second: The seller (defendant) must cut out all runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle from a herd of cattle of full ages, and that are as good or better than Terrasas cattle.

Third: The plaintiff had the privilege of cutting out and rejecting fifteen per cent of the cattle when tendered as agreed, which must be done at Moraga or Distilidera. This was a provision for the benefit of Mr. Hall, and he could have waived it had he so desired.

Fourth: They must be brought to the International line.

Fifth: Plaintiff must guarantee payment in a manner satisfactory to the First National Bank of Nogales, Arizona, before they cross the line.

Sixth: Cattle are to be loaded on board cars.

Seventh: Then plaintiff agreed to pay the balance of the purchase money, and if he fails to pay the balance, he forfeits the amount advanced on the contract.

PROPOSITION A.

The Federal Court has the right to comment on the weight of the evidence.

STATEMENT

This entire point resolves itself into whether or not the Court has that right, and we feel the right is so well settled, it needs no comment or authorities.

PROPOSITION B.

The Court fully covered all requirements of placing upon plaintiff the duty to show he was ready, able and willing,—instructed the jury (pp 333-334)

"You are instructed if you find from the evidence and believe that plaintiff was ready and willing and able to receive and pay for all cattle, in the numbers, of the ages, brands and quality required under the terms of the contract sued upon, and if you further find from the evidence and believe that the defendant failed in any respect to comply with the terms of said contract (provided you further find that such non-compliance on the part of the defendant was not occasioned by the act of the plaintiff), you should find a verdict for the plaintiff in the full sum of $20,000.00 as prayed for in plaintiff's complaint."

STATEMENT.

((See general statement under point No. 2).

The Court also instructed (pp 334-335):

"You are instructed that no duty developed upon the plaintiff in the matter of delivery and acceptance of cattle from the defendant under the terms of the contract sued upon, other than to accept such contract cattle in train-load lots, provide cars for transporta-

tion and pay to the defendant the contract price per head upon delivery of the cattle, free of all duties and expenses on board cars at Noagles, Arizona. Unless, therefore, you find from the evidence and believe that the defendant actually gathered contract cattle in train-load lots, ready for delivery on board cars at Nogales, Arizona, plaintiff was under no obligation to arrange for payment therefor in a manner satisfactory to the First National Bank of Nogales, Arizona."

DISCUSSION.

As shown by the above statement the contract makes the first duty rest upon Mr. Hall to give notice, which he complied with, and it then became the duty of the Company to cut out all runts, unmerchantable cattle, etc., and tender a train-load of cattle of full ages as good or better than Terrasas cattle, and the court instructed the jury (p. 341):

> "In other words, it seems to me that they had not reached those points,—they had gotten to the point where the contract was breached by one party or the other before the time arrived for the plaintiff to make these financial arrangements or these arrangements for cars or for the defendant to deliver the cattle on board the cars at Nogales Station, Arizona."

The entire point covers practically the same issues, and we feel the court's interpretation is correct, and any other would lead to foolish waste of time, for if defendant did tender cattle that fully complied with the contract on May 13th, the plaintiff breached the contract by refusing to accept them, regardless of the fact of his being ready,

able and willing to comply with the contract, and if on the other hand defendant did not tender cattle that complied with the contract, it breached the contract with their letter of March 13, 1913 (Exhibit K., p. 38) regardless of whether plaintiff was ready, able and willing, to receive cattle, that is, of course, unless it should have been shown that the Company refused to comply with the contract on account of the inability of Mr. Hall in this respect.

The cases cited in Brief (p. 26) are not applicable, for in the Iroquois Furnace v. Bignall H. Co. (66 N. E. 237),—held Plaintiff cannot recover without proving a prima facie case, that he is ready, willing and able to perform the contract.

The cases of Porter v. Rose and Reid v. American Co.—plaintiff neglected to prove he was ready, willing and able, and the court held it was necessary. In both of these cases no evidence was presented, but in this case, as we have shown by above statement, we presented sufficient proof of these facts.

In the case of Russell v. Excelsior S. & M. Co., the question of proof of ready, willing and able did not arise, but the court did say, "Defendant in pleading a set-off assumes the position of a plaintiff, and, in order to recover, is required to prove the same facts he would be bound to prove if he had brought an original action on his demand.

The cases cited in Brief on page 28 do not apply to our case, as in the case of the Iroquois Furnace Company v. Bignall H. Co., the court held that it was necessary to make some proof of the fact that plain-

tiff was ready and willing and able in order to recover.

In the case of Eppens etc., Co. v. Littlejohn, it is held that it was necessary for plaintiff to show performance within a reasonable time, and we did show performance and carry our burden so as to comply with this case.

In the case of Cummings v. Tilton, the court held that the instructions given by the trial court were not broad enough, in that it did not place any requirement on the plaintiff to prove his readiness and ability to pay. The instructions only required proof of willingness. The court in our case placed the burden of proving all upon us.

In the case of Duryea v. Raynor, the court placed the burden of proof upon the defendant to prove the allegations of the answer in respect to the counterclaim, but further in the case held that the counterclaim was not supported by proof, and, therefore, was not submitted to the jury, so the instruction given operated to place the burden of plaintiff's case upon the defendant, which is wrong, and in our case the burden was placed upon us, and even counsel for defendant admitted that we put in an abundance of proof on this subject.

POINT NO. 3.

The learned court erroneously construed the contract to permit the plaintiff to refuse the tendered herd of cattle even though there was a full train-load of contract cattle there and only a few unmerchantable cattle.

STATEMENT.

The contract provided (p. 10):

"The seller also agrees to allow the buyer the privilege of cutting out and rejecting fifteen per cent of said cattle after *all* runts, stags, (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle have been cut out by the seller."

PROPOSITION A.

A contract is to be construed most strictly against the one who wrote it.

STATEMENT.

W. Beckford Kibbey, Jr., (President of defendant company) testified on direct-examination (pp. 231-232) by Mr. Seabury:

"Q. Mr. Kibbey I show you Plaintiff's Exhibit A. and ask you to tell us in whose hand-writing the body of that contract is?

"A. My own. All the hand-writing on that is my hand-writing except the signature of Ed. W. Myers, and except the date."

AUTHORITIES.

Noonan v. Bradley, 76 U. S. 394;

Taylor v. Union Saw-mill Co., 152 S. W. 150;

Commercial, etc. Co. v. Mo. Com. Co., 148 S. W. 995;

Lyon v. Dailey Copper, etc. Co., 126 Pac., 931.

DISCUSSION.

Counsel for defendant admitted that this was a good rule of law, however, the argument came up on another question. He said (p. 232): "I realize, your Honor, that one of the rules of construction upon which my friend has relied is that the instrument being in the hand-writing of the defendant would be more strictly construed against the party",—and we cannot help agreeing with his statement of the law.

PROPOSITION B.

Was there a duty resting on defendant to cut out the runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship or unmerchantable cattle.

STATEMENT.

(See general statement under point No. 3 for provision of contract).

This is particularly a question of fact, so we will examine some testimony in support of the court's instruction,—Plaintiff Hall testified (p. 145):

> "Probably thirty-five per cent of them were as good as or better than Terrasas cattle. Well, I wont say that they were as good, but they were so nearly as good that I would have accepted them. The balance of the herd consisted of yearlings, stags and bulls, and cattle that were not in condition to ship—sore-footed, poor, looked like they had been on the trail for a week or ten days and were worn out. Under the contract I had the privilege of cutting out fifteen per cent after all of the unmerchantable cattle had been trimmed out

by the sellers. I never exercised that privilege, because the herd was never put up in satisfactory shape, and it was for them to do their work first. The herd was not put in the shape that it should have been in under the contract. I mean that it consisted of forty per cent yearlings—fully forty per cent were yearling steers, which I called Mr. Elias' attention to, and he said, "Very well, we are going to ship them to some one else". I said, "I am not going to trim your herd for you."

K. D. Oliver testified (p. 162):

"I should say not more than 50 per cent if that many. The rest of them were either short, aged, deformed or runts, or tender-footed, or thin, ill-shapen, or something of that—or not of the grade, not of sufficient quality to be of the same grade. Of the cattle that I inspected at that time I shouldn't say came up over four or five hundred head to the requirements of contract cattle. About eight or ten car-loads. Out of which under the terms of the contract there was still to be a cut of 15 per cent. On that occasion I had a conversation with reference to these unmerchantable cattle with both Mr. Kibbey and Mr. Elias. I told Mr. Elias that the cattle were not contract cattle; that we didn't want to take them; there weren't sufficient numbers and that the herd of cattle wasn't properly tendered. It wasn't in shape for the buyer to cut—to pass on them. They hadn't cleaned up the herds themselves. At first Mr. Elias said he didn't agree with me. Then upon our arguing the matter he said he agreed that they were not contract cattle; that there

were many cattle in there that were not contract cattle. Mr. Kibbey said substantially the same as Mr. Elias at that conversation."

James A. Johnson testified (p. 188) :

"Q. Did you see any unmerchantable cattle in the bunch Mr. Johnson? A. Yes sir.

Q. Did you see any cripples?

A. There were sore-footed cattle.

Q. Any lump-jaws, sway-backs or blinds?

A. Yes there were sway-backs. I don't know as I noticed any lump-jaws.

Q. Did you see any runts or stags?

A. Yes quite a number."

W. B. Kibbey, Jr., testified (p. 225) :

"It is a very difficult thing to say what percentage of a herd comes up to contract without actually cutting the cattle, but in my opinion I should say that at least three-fourths of those cattle come up to the contract."

(p. 241)

"About twenty per cent that were near the trees were lying down. It is my experience that when cattle have been driven for days, that is what happens. I suppose the cattle having been driven for days prior had something to do with their lying down although the cattle had been there for three days. I suppose they wanted to lie down because they wanted to get off their feet. It is quite probable that they wanted to ease their feet a little. They would have to be driven nine or ten miles to Nogales. I said they had been driven three or four days previously. That

doesn't mean that they had been driven three or four days continuously. I do agree with witnesses for the plaintiff that cattle with tender feet could not be shipped, but any cattle that lie down is not the test. If it walks without limping that indicates that his feet are not tender. If he won't get up when you ride around, you ought to make him—ride up to him."

Ramon Elias testified (pp. 280-282-283):

"Q. Each one of those was a full two year old?

A. I am not supposed to clean up a herd for some body else.

Q. What do you mean by cleaning up a herd?

A. I am not supposed to deliver the other man just a two year old. It is up to him whether it is a two year old or not. . . . . If the buyer thinks there are any unmerchantable cattle in the herd, it is his duty to show the seller where he is wrong or right.

There might have been some yearlings in that bunch; I don't claim to say that every one was a full year old—or a full two year old—he had a right to cut them if they were. I don't consider an animal two years old a stag. There might be some stag steers, but I consider a stag a full four year old animal. There may have been some stags in the bunch but I don't consider them stags. There may have been a few that were pretty thin."

Thomas J. Donohue testified (pp. 292-293-295):

"When I went to receive them, the herd was, I judge about between 1250 and 1300 cattle in the herd. To the best of my knowledge that included the cattle that I saw on the 8th which were gathered for tender

to Hall. I couldn't tell you exactly how many short ages I cut out. Altogether I cut out about 300 head. I should judge . . . . . I cut back about 300 unmerchantable, short ages and cattle I didn't care to take on my contract . . . . Of those 300 cattle I cut back, they were undesirable cattle in my opinion, undesirable to me, might be blind, might be runt, might be sway-back or for some reason, I cut those cattle back. . . . . I'll give you the exact figures. I've got them right here if you will write them down. 22 yearlings that we found in the yards after we got to town."

E. W. Myers testified (pp. 313-314):

"I think there were a few stags in there. I don't know how many. I don't think there were many in there too thin to ship. There may have been a few. I am not prepared to say that they were all full two years old. I did not see any three's or four's in that herd. I don't think there were cattle over three years old in that particular herd. I think there were some in there that were not full two year old steers at that date."

DISCUSSION.

We challenge the statement in the brief of Plaintiff in Error that "the Company made a bona fide effort to cut out all unmerchantable cattle and cattle not within the contract from the herd", and the testimony of their own witnesses show that there was no attempt to clean up the herd. Mr. Kibbey said (p. 225): "three-fourth of those cattle would come up to contract;" Mr. Elias testified

(p. 281): "I am not supposed to clean up the herd for some body else." Mr. Donohue stated (pp. 292-293): "I cut back about 300 head unmerchantable, short ages and cattle I did not care to take" (of herd of 1250 to 1300; See p. 292). Counsel evidently over-looked that testimony when they made that assertion, and, therefore, we do not think the court erred in interpreting the contract as complained by the Company which we feel is a reasonable construction.

An examination of the cases on page 30 shows that in all of the cases the court has asserted that the contract must be construed as reasonably as its terms will allow, but none of the cases are in point, for in the absence of showing that the contract is unconscionable or fraudulent, the court will construe it according to its evident meaning, and that is all we ask, feeling that we are entitled to this construction.

POINT NO. 4.

The learned Court made numerous errors in the admission and exclusion of evidence, and in refusing to charge.

PROPOSITION A.

Did the court err in sustaining plaintiff's objection as fully set-out in Error III.

STATEMENT.

The objection as raised by Counsel for plaintiff was: (p. 153).

"We object, if your Honor please, on the ground that it is not proper cross-examination upon any subject upon which he was examined in chief, and not competent unless counsel desire to make this witness their own witness for this purpose."

This admission was covered when E. W. Myers was put on the stand, who testified, without objection (p. 311):

"And in discussing the case I asked him if he did not think he made a mistake in refusing to cut the cattle, and he said "yes" that he thought he made a mistake in not cutting them."

And Mr. Hall testified in rebuttal (p. 318):

"I heard the testimony of Mr. Myers with reference to a conversation in which Mr. Myers stated that I said that I had made a mistake in not cutting the cattle at the time they were offered at the Distilladero Ranch in Mexico. The conversation was this: We were discussing the circumstances as they happened, and I told him that I thought it would have been better if we had gone ahead and cut out of the cattle that there was in the herd all that did comply with the contract because we would have convinced the Alamo Cattle Company beyond a doubt that they did not have a train-load. He said he could not tell about that. He did not know whether they did or did not have a train-load."

DISCUSSION.

This needs no authorities for the objection made was not to the substance but to the procedure, and is unquestionably good. It was not in proper shape for an impeach-

ing question, and if intended merely as an admission, it was placed before the jury properly when Myers was put on the stand, and also by Mr. Hall in rebuttal, and without cross-examination by Counsel for defendant. We, therefore, say that the Court properly sustained the objection made, and it could not have injured defendant, because it was afterwards given to the jury.

An examination of the cases cited under Proposition A. Point 4, does not disclose any case in which the alleged admissions were afterwards testified to and were placed before the jury, as was done in our case.

PROPOSITION B.

Irrelevant testimony.

STATEMENT.

The objection and testimony is fully set out in Error IV (pp. 87-89, 157 Brief 34).

DISCUSSION.

The object of the testimony was clearly shown to merely develop more fully facts brought out on cross-examination, and therefore proper.

PROPOSITION C.

Hypothetical answer of witness.

STATEMENT.

Answer is set up in brief of Plaintiff in Error (p. 34).

DISCUSSION.

The cases cited in Brief on page 34, under this sub-head, are not applicable to our case.

In the case of Pilcher v. U. S., the court held it was error to allow revenue officer to testify to an admission of defendant, which was made while the revenue officer was within hearing, but concealed, and the defendant being only identified by his voice.

In the case of McFarlane v. Howell, the court held that the opinion of the witness was irrelevant and hear-say and also immaterial, but as it was not taken advantage of at the proper time, it could not be objected to.

These cases are unquestionably not applicable to the proposition under which they are cited, for the question objected to is an absolutely immaterial matter and could not prejudice the case either way, and we do not see how it could be objectionable to defendant.

PROPOSITION D.

Improper evidence as to samples.

STATEMENT.

The objectionable answer was (p. 187):

"There was only about twenty or twenty-five per cent of the cattle that were tendered that were up to the sample that I looked at in the first trip. Some of those were not in shipping condition."

Objection made by defendant's counsel (p. 187):

"I move to strike out the last answer of the wit-

ness on the ground that it is not the proper test of performance under this contract as to whether or not the cattle exhibited to him in May, 1913, were as good as the samples which he looked at in April, 1913, it not appearing that the defendant had shown him anything in April, 1913."

Witness had just testified (p. 186) "The cattle exhibited to me by Mr. Kibbey or Mr. Elias were a good class of cattle and I think a grade better than the average Terrasas cattle". Ramon Elias testified (pp. 254-255) that he showed Mr. Johnson the cattle in April, 1913, pointing out what "we" thought was "a fair sample of the cattle we were to deliver."

DISCUSSION.

We complied with the only objection raised by counsel, as it clearly appears defendant showed Johnson the cattle in April, 1913, and, therefore, the court's ruling was proper.

PROPOSITION E.

Erroneous admission of evidence as to reason for an alleged fact.

STATEMENT.

(p. 189)

"He stated that one particular brand of cattle that he had explained to me about wanting, white-faced cattle they called them, and owned by a certain party, had been refused delivery on account of the Constitutional government making a demand on the party for eighteen thousand dollars, and the owner of the cat-

tle said that he was going to keep his cattle, hoping that in the future he might be able to sell his cattle and keep his money. If he sold the cattle the new government would take it away from him, and consequently he couldn't get those cattle".

"MR. SEABURY: I move to strike out the answer, if your Honor please, as being wholly immaterial to the issues involved in this case."

DISCUSSION.

This is merely an admission by defendant that is presented, which in Proposition K., defendant objects to (the reverse of the proposition) and says it is error not to allow evidence of an admission by plaintiff. The only objection made is that it was immaterial, but an examination of the question and answer clearly shows its materiality and no other objection was made to it.

PROPOSITION F.

Erroneous exclusion of evidence relating to Mr. Myers.

STATEMENT.

Question objected to in Error XIII was (pp. 102, 258):

"Q. What, if anything, was said between you and Mr. Oliver with reference to what, if anything, Mr. Myers was going to do if he was present on these occasions?"

The contract between plaintiff and Myers (Exhibit B. pp 11-12) provided:

"It is also mutually understood and agreed that the said Ed. W. Myers or E. M. Tankersly, his agent, shall be on the ground at the time of delivery of all cattle and aid and assist the said J. G. Hall, his agents or assigns, in receiving said cattle."

DISCUSSION.

Both of the errors complained of above are the result of a misconstruction of Exhibit B., for it does not provide, nor was it intended to provide that Myers and Tankersly are to be agents of Hall for they have no identical interests and could not act for him, but the contract clearly provides that "Myers or Tankersly, his (Myers') agent shall be on the ground—and assist Hall". With the proper interpretation of this contract, the objections treated under this Proposition have no force.

In the case of Caldwell v. Auger cited (Brief p. 36) (4 Minn., 156) was a case in which the question arose as to the right to prove an admission as an estoppel in pais without pleading it. Court held it could be proven, but there are no facts similar to our case and has no application.

The case of Crippen v. Graham is evidently wrong for there is no such case reported in 88 N. Car.

Charleston v. Collins was not available.

PROPOSITION G.

Erroneous admission of evidence as to custom. Persons who are engaged in a particular trade or business, or persons accustomed to deal with those in a particular business, may be presumed to have knowledge of the uniform course of dealing in such business.

STATEMENT.

Witness for defendant, A. M. Joffroy, testified (p. 299):

"I am familiar with the files of the Southern Pacific Company at Nogales, Arizona, with reference to orders for cars for shipments out of Nogales, Arizona."

(p. 302)

"We had cars at Nogales that could have been used by plaintiff on May 10th."

(p. 303)

"Q. Now could they not have ordered some and received them?

A. I should say yes."

(pp. 304-305)

"A. Yes, sir. So the mere fact that we had given the use of these cars to some one else on the 9th would not have prevented Mr. Hall or Mr. Oliver from wiring to Tucson and having the cars down there for the 12th, if they had use for them. They could have secured them on the 12th, notwithstanding they cancelled the order for the cars that they ordered on the 9th."

"Q. You would not expect people to order cars unless they had use for them, would you? Now, Mr. Witness isn't it customary when cars are ordered and the one who orders them finds that he has no immediate use for them, to cancel that order to save demurrage of a dollar a car?

Cancellation telegram, Defendant's Exhibit No. 1, (p. 43):

"Tucson, Ariz., May 9, 1913.

"Agent Southern Pacific Co.,

Nogales, Ariz.

"Referring to our file number two car order for thirty-two Santa Fe stock cars load your station tomorrow please cancel as cattle not ready writing you from El Paso.

8:30 a. m. K. D. Oliver."

AUTHORITIES.

3 Ency. of Evidence, 933, and cases cited.

DISCUSSION.

There was no effort on the part of the defendant to show they were ignorant of that custom, and they, therefore, cannot complain. We cannot see how defendant is prejudiced by the ruling, nor do we see that it helped us, except to merely explain the general course of dealing in Nogales in regard to cars, so as to over-come the apparent inference raised by defendant, that plaintiff made it impossible for it to perform the contract. An examination of telegram cancelling the cars specifically states, "please cancel as cattle not ready", leaving sufficient inference that they would be needed later when cattle would be ready. The only way in which the failure on the part of plaintiff to furnish cars could have effected the defendant is, if cars were not there when cattle were ready to load, defendant could have delivered in yards and would then be relieved from loading. Therefore, we feel the court committed no error in allowing Jeffrey to testify.

All the cases cited (p. 37) are inapplicable, as in

those cases the question arose as to the proof of a custom that was the material issue in the case, and the evidence was objected to as not proving custom, while in our case the objection was (p. 305) that it was immaterial and incompetent,—hence the cases cited do not apply.

PROPOSITION H.

Refusal to charge defendant's written supplemental report No. 4 was error.

STATEMENT.

The charge set out in brief (p 38) does not contain all the charge as requested (See page 324). The Court instructed, (p. 337):

"If you believe that the cattle tendered to the plaintiff on May 9th and May 12th fulfilled all the requirements of the contract and that plaintiff failed or refused to accept them, then this constituted a breach of the contract on the plaintiff's part, which relieved the defendant from any further duty to be performed on its part and justified the defendant, the Alamo Cattle Company, in writing the letter dated May 13th, declaring the plaintiff's rights in the contract forfeited."

(pp 341-342)

"In other words it was the duty of the defendant upon receipt of fifteen days' notice of each delivery in train-load lots during the month of April and up to and including May 12th, 1913, to gather and deliver f. o.b. cars at Nogales Station, all duties and expenses

paid, the cattle called for under the terms of the contract."

DISCUSSION.

The telegram complained of (Exhibit L.) demanded the cattle under contract for delivery between May 29th and June 1st. It should be remembered that the contract placed upon us the duty of giving fifteen days' notice, and that the deliveries were to be made in April and May. The telegram was sent on May 14th and delivery could not be demanded under fifteen days, which plaintiff gave defendant; and we see no way in which the defendant can be injured by merely requesting it to comply with its contract, and we feel the above charges as given fulfill all the requirements of the contract.

The case cited (p. 38) have no application in the instant case and have been discussed under Point No. 3.

PROPOSITION I.

Erroneous admission of evidence as to compromise contract.

STATEMENT.

On re-cross examination (pp 208-209) plaintiff testified:

"A. The agreement that we made was that he was to deliver to me a thousand head of steers, three and four year olds—I won't say four year olds. I thing Mr. Kibbey stated that he would not make them all fours. I considered any kind of a settlement that

would avoid a lawsuit was a good way, and accepted his proposition to deliver me a thousand four year olds in the fall and give me a contract showing the receipt of ten thousand dollars advanced on that contract. And that was the only proposition that we agreed upon. He agreed to do that, and I agreed to accept it. He afterwards went back on it.

On re-direct when an examination was made as to this new agreement, defendant objected (Error X pp 94, 209-211) on the ground that the question was leading and not proper re-direct examination, and further that it was incompetent. On cross-examination (p. 152) plaintiff testified:

"Mr. Kibbey thought that he was entitled to a certain amount of this money, on account of having to gather and hold these cattle, and I told him it was no fault of mine that he did not have the cattle to deliver to me in train-load lots as required by the contract; that I was damaged more than he was. But he seemed to insist that that was the best settlement that he would make—allow him to retain four thousand dollars, and pay me six thousand dollars in deferred payments, to which I objected. And I told him that I considered the damage was coming to me, not to him; that I had the cattle sold. I explained to him how I had these cattle sold out, and I would have to lose my profit on the cattle; and we discussed it back and forward for considerable time, and finally he said that he would not make any settlement unless he could get approximately four thousand dollars out of the deal in some way or other, and we finally—he finally

said that he thought he could make four thousand dollars profit on this thousand head of big steers, if I would give him until fall to get them. I told him I would do it if he gave me a contract and a receipt on the contract for ten thousand dollars. I would have taken ten thousand dollars from Mr. Kibbey or any one else at that time and date and would have quit the deal."

DISCUSSION.

Under this proposition plaintiff in error alleges "What was done or not done pursuant to the compromise contract was not relevant to the issue set forth in the pleadings, in which there is no mention of such a contract." It should be remembered that this alleged settlement was principally developed by counsel for defendant on re-cross examination (pp 208-209), and the objected to question and answer was merely re-direct examination on matter developed on re-cross examination.

The case cited (p. 39—Jordan v. Fenno) was a case in which there was an attempt to vary the terms of a written instrument, and the court held that proof of a different contract could not be made in the absence of an allegation of fraud, and this case does not apply.

In the case of Feuchtwanger v. Manitawoc M. Co. (187 Fed. 713) Circuit Court of Civil Appeals for the Seventh Circuit held that in order to introduce evidence of modification or a waiver of a contract, it

must be shown that there was a plea of modification or waiver, and in our case there is no such plea, and we, therefore, contend that the court was proper in his rulings.

In the Owl Creek Coal Co. v. Golder, the Court stated the quotation given in brief, in a case in which there were no facts similar to ours.

POINT NO. 5.

The learned Court erred in denying the defendant's motion for a directed verdict on the ground of a variance between the proof and the pleading on the part of plaintiff.

STATEMENT.

(See statement under proposition H.)

W. B. Kibbey testified (pp 220-221):

"Mr. Oliver then made the suggestion if we would deliver them one thousand head of three and four year old steers in the fall at $32 a head, that in that way we would get $4000 over and above the contract price that we had sold them for—four year old steers at that time, and he asked me whether that would be satisfactory or not. I told Mr. Oliver that it was absolutely impossible for me to make any arrangement, unless I consulted Mr. Myers, because Mr. Myers I considered was a party in these contracts and his interests had to be taken care of. I told him, however, I would speak to Mr. Myers and get his decision."

Defendant's Exhibit 8, introduced, (p. 222) as follows:

"K. D. Oliver, Nogales, May 13th, via Tucson, Ariz., May 14th, W. D. Oliver, El Paso, Texas. Myers refuses to compromise. Advise if you wish to go ahead with our verbal agreement. Alamo Cattle Company, Kibbey, President."

PROPOSITION A.

The evidence did not show a valid contract made between the plaintiff and defendant—no mutuality.

DISCUSSION.

This is too clear to elaborate upon. Kibbey said he would not accept. He sent Exhibit 8, saying Myers would not accept. Hall testified: "He agreed to do that, and I agreed to accept it. He afterwards went back on it," and that they never delivered any cattle under it (p 210). The evidence never was in shape to show a subrogation.

PROPOSITION B.

In an action for a breach of a contract, defendant's failure to plead a modification thereof, is a waiver of that defense.

STATEMENT.

There was no new contract placed by either party.

AUTHORITIES.

Sutter v. Raeder, 50 S. W., 813—149 Mo. 297.

Feuchtwanger v. Manitawoc M. Co., 187, Fed., 713.

DISCUSSION.

This is strictly a legal proposition, and we cannot see where defendant can find the elements of a new contract, as there is especially lacking any consideration, mutuality or subrogation, and to up-hold this we have only to point the court to Proposition I., on page39 of brief of Plaintiff in Error, where they contend, "What was done or not done pursuant to the compromise contract was not relevant to the issue as set forth in the pleadings, in which there is no mention of such a contract".

The cases cited on pages 40 and 41 of the brief held that proof of an entirely different agreement than that set up in the pleadings or judgment asked on a different contract than that declared upon, would not be allowed, and, therefore, the cases have no application to ours.

In this connection we desire to call the court's attention to the case of Feuchtwanger v. Manitawoc M. Co. (187 Fed. 713) (Brief p. 39) which holds that defendant has waived his right under a new contract if he has not plead it, and the same ruling was made by the court in the case of Sutter v. Raeder, Supra.

POINT NO. 6.

The motion for a new trial should have been granted.

STATEMENT.

This specification is too general, and has been covered by us in the foregoing.

CONCLUSION.

For the reason stated specially under each sub-head of this brief, we do not feel that the court has committed error, but was equitable and just in its ruling on the evidence and in its instruction to the jury. However, if the Court has erred, as charged by the specifications, it is not of such materiality and weight as to have caused injury to plaintiff in error.

Wherefore, Defendant in Error for the reasons herein stated, says the judgment of the District Court should be affirmed with costs.

Respectfully submitted,

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Dated San Francisco, California,
October 15, 1914.